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WHAT CONSTITUTES AN EXPRESS WARRANTY IN THE LAW OF SALES.

THE purpose of this article is to consider what promises or statements make a seller liable for the character or quality of the goods which are the subject of the sale. For the purpose of this discussion it is not material what obligations so created are collateral and what are part of the seller's primary promise. The single object is to determine when the seller will be liable, not how his liability may be enforced, or whether it will survive acceptance of the goods.

The law of warranty is older by a century than special *assumpsit*, and the action upon the case on a warranty was one of the bases upon which the law of *assumpsit* seems to have been built. The action on a warranty was regarded as an action of deceit, and the words "*warrantizando vendidit*" seem to have been necessary to make a good count as the words "*super se assumpsit*" later were in the action of *assumpsit*. The action on a warranty was thus conceived of at the outset as an action of tort.[1]

This is, of course, also true of the action of *assumpsit*, but it was not long before *assumpsit* came to be regarded, as it is regarded to-day, as distinguished from tort and rather to be classed in its essential nature with covenant than with trespass on the case. But the right of action on a warranty was not regarded at once as similar in its nature to *assumpsit*. It was, indeed, not until 1778 that the first reported decision occurs of an action on a warranty brought in *assumpsit*,[2] though from the language of the courts in that case it

[1] Ames, History of Assumpsit, 2 HARV. L. REV. 1, 8.

[2] Stuart *v.* Wilkins, 1 Dougl. 18.

appears that the practice of declaring in *assumpsit* had been common for some years before. It is probable that today most persons instinctively think of a warranty as a contract or promise; but it is believed that the original character of the action cannot safely be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract. In the early case of Chandelor *v.* Lopus,[1] the court held that a declaration was insufficient after verdict which stated that the defendant affirmed a stone which he, as a goldsmith skilled in precious stones, sold to the plaintiff to be a bezoar-stone whereas it was not, and the court said: "the bare affirmation that it was a bezoar-stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar-stone, it is not material, for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action." It seems a fair inference from this language that the use of the word warrant was necessary in order to make the seller liable, or at least words importing a direct and positive promise on the part of the seller. This attitude of the law is in conformity with the general unwillingness manifested by the early law to make any implication and to rely strictly on the exact form in which a transaction was put.

Lord Holt, however, decided that an affirmation of title in the seller, though not known to be false, and though not put in the form of a warranty or express promise, was ground for liability.[2] It was easy to take the same step in regard to warranty of quality

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[1] Cro. Jac. 4.

[2] Cross *v.* Gardner, 1 Show. 68 (1689); s. c. Carth. 90; s. c. 3 Mod. 261. In this case the declaration alleged that the defendant sold oxen to the plaintiff "and did falsely affirm them to be his own, whereas in truth they were the oxen of another man." After verdict, it was moved in arrest of judgment that the declaration was not good because the plaintiff had not alleged that the defendant knew the oxen were not his own; but, nevertheless, the plaintiff had his judgment. It was said that it might have been good upon demurrer, but after verdict was well enough.

Medina *v.* Stoughton, 1 Lord Raym. 593; s. c. 1 Salk. 210 (1700). In this case the plaintiff declared that the defendant, being possessed of certain lottery tickets, sold them to the plaintiff, affirming them to be his own, whereas in truth they were not. The defendant pleaded that he bought them in good faith before the sale and so sold them in good faith. The plaintiff demurred, and Holt, C. J., said: "The plea is ill, and the action well lies. Where a man is in possession of a thing, which is a color of title, an action will lie upon a bare affirmation that the goods sold are his own." How far these decisions advanced beyond the earlier law is not perfectly clear, Furnis *v.* Leicester, Cro. Jac. 474; *Anon.*, 1 Roll. Abr. 90, 91, fl. 5–8, but Lord Holt at least made clear what was doubtful before.

that had previously been taken in regard to warranty of title. And though there is a dearth of authority during the eighteenth century, it is probable from the cases about the beginning of the nineteenth century that an affirmation of quality inducing a sale had for some time been recognized as rendering the seller liable as a warrantor. The gist of the action was the affirmation of the seller inducing the sale, irrespective of any fraudulent deceit on the seller's part. An action on the case for breach of warranty did not require an allegation that the seller knew his affirmation to be false, and if such allegation was made it did not need proof.[1]

The nature of the action explains several features in the law of warranty that would have no proper explanation if the action sounded wholly in contract. The rule in regard to obvious defects is of this sort. There seems no reason why a seller should not promise to be answerable in damages for obvious defects, but his liability in tort is another matter. Just as in deceit it is essential that the statements must be such as to induce the plaintiff naturally to rely upon them, so in warranty this natural reliance on the seller's assertions was early regarded as essential. Chief Justice Brian said: "If a man sells me a horse and warrants that he has two eyes, if he has not, I shall not have an action of deceit, as I could know this at the beginning."[2] This was repeated in later cases, and the point of the remark was brought out by a later observation: "and the distinction is taken where I sell a horse that has no eye, there no action lies; otherwise where he has a counterfeit, false, and bright eye."[3] It is obvious, however, that a buyer might rely on a seller's statement and be deceived, even though he could have found out the truth by careful inspection, and this was recognized before long.[4]

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[1] Denison *v.* Ralphson, 1 Vent. 365, the second count stated a warranty that the goods sold were good and merchantable, and averred that the defendant delivered them bad and not merchantable, knowing them to be naught; the court observes that though the declaration be "knowing them to be naught," yet the knowledge need not be proved in evidence. In Williamson *v.* Allison, 2 East 446, 450, Lord Ellenborough said: "For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and the form of the action cannot vary the proof in that respect."

[2] Y. B., 11 Edw. IV, 6.10.

[3] Southerne *v.* Howe, 2 Rolle 5. See also Y. B., 13 Hen. IV, 1.4.

[4] Butterfeild *v.* Burroughs, 1 Salk. 211. This was an action for breach of warranty of a horse which lacked an eye. After verdict for the plaintiff it was objected in arrest of judgment "that the want of an eye is a visible thing, whereas the warranty extends

Another curiosity in the early law of warranty is found in a statement by Blackstone: [1] "The warranty can only reach things in being at the time of the warranty made, and not things *in futuro;* as, that a horse is sound at the buying of him, not that he will be sound two years hence." An understanding of Blackstone's meaning requires reflection upon the origin of the law of warranty in an action based on deceit. It is, of course, law today that one may bind himself by contract for the happening of any future event, and a warranty of a piano for a year, for instance, is a contract to be answerable for any defect that may occur during that time.[2] When warranty is based not on an actual contract, however, but on an obligation imposed by law on the seller because of a misrepresentation he has made, the reason of the old rule is plain. It is commonly laid down in the law of deceit that a misrepresentation upon which an action may be founded must be in regard to an existing fact.[3] This has been qualified, especially in recent times, by recognition that a promise is itself a representation of an existing intention.[4] But this qualification is rather apparent than real, since the deception consists not in the future event to which the promise relates, but in the existing fact of the promisor's intention to keep it. It seems upon principle, therefore, that unless an actual contract can be made out, or unless representations as to future events carry with them necessarily a representation as to a present condition, as may often be the case,[5] the statement of Blackstone is sound.[6]

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only to secret infirmities, but to this it was answered and resolved by the court that this might be so, and was intended to be so since the jury has found that the defendant did warrant."

[1] 3 Comm. 165.

[2] So a warranty that metallic shells to be manufactured shall "finish sound." Franklin Mfg. Co. *v.* Lamson Mfg. Co., 189 Mass. 344. See also Osborn *v.* Nicholson, 13 Wall. (U. S.) 654; White *v.* Stelloh, 74 Wis. 435.

[3] Cooley, Torts, 3 ed., 929.

[4] Edgington *v.* Fitzmaurice, 29 Ch. D. 459; Swift *v.* Rounds, 19 R. I. 527. So it was held in Lederer *v.* Yule, 67 N. J. Eq. 65, where a representation that a patent burglar alarm could be made cheaply was held a representation of a present fact.

[5] Thus, a representation that a machine will work well for five years, is a representation as to its present condition in effect. The representation means that the machine as it stands is so well constructed as to be capable of enduring use for that period. So a representation that it will require a load of 250 tons to break it. Miller *v.* Patch Mfg. Co., 101 N. Y. App Div. 22. So a warranty of seed peas that they would "pick four or five days earlier than any other seed on the market." Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145; Richardson *v.* Mason, 53 Barb. (N. Y.) 601; Huntington *v.* Lombard, 22 Wash. 202.

[6] In Houser's Case, 39 Ct. Cl. (U. S.) 508, an assurance by the seller that the buyer

Though the idea of warranty as forming the basis of a tort has been lost sight of by many courts in this country in modern times, courts of the highest authorities have recognized that a plaintiff may sue in an action of tort for a broken warranty.[1] It is apparent that a seller may, if he chooses, make promises in regard to the character of the goods which will be binding on ordinary principles of contract, and for which it would seem that *assumpsit* was a more appropriate remedy than an action on the case, though even where there is a clear promise, if it relates to the existence of a supposed fact, the promise will be a representation or affirmation of the fact as well as a promise. But a promise is unnecessary, and most of the confusion in the law of express warranty is due to a failure to observe that a representation or affirmation by the seller which cannot without straining the facts be properly regarded as contractual (though the remedy of *assumpsit* and its equivalents may for convenience be permitted) is, and should be, a ground of liability for the seller.

In the light of this introduction some examination may now be made of the disputed points in the law of warranty. Cases which illustrate the rule that an express promise or an agreement to warrant, made at the time of the sale, renders the seller liable, need hardly be stated. But few definitions are more in conflict or more inexactly stated than those defining what statements not made in the form of an express warranty or promise will render the seller liable. In Pennsylvania, following a strong bent given to the law by Chief Justice Gibson, the courts seem to have confined the seller's liability to cases where he makes an express promise.[2]

No other American jurisdiction seems to go as far as Pennsylvania in this respect, but many American authorities, especially

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would have the right to remove shacks sold by the government until a certain day, was held to amount to a warranty that up to that time the seller would have authority to transfer title. In this case the seller may well have been regarded as contracting. In Collins *v.* Tigner, 60 Atl. 978 (Del.), the court ruled that it was essential that a warranty should be broken when made. This statement clearly needs qualification.

[1] Shippen *v.* Bowen, 122 U. S. 575; House *v.* Fort, 4 Blackf. (Ind.) 293, 295. See also Gresham *v.* Postan, 2 C. & P. 540; Watson *v.* Jones, 41 Fla. 241; Tyler *v.* Moody, 111 Ky. 191; Hillman *v.* Wilcox, 30 Me. 170; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495, 520; Place *v.* Merrill, 14 R. I. 578; Piche *v.* Robbins, 24 R. I. 325; Trice *v.* Cockran, 8 Grat. (Va.) 442, 450.

[2] Borrekins *v.* Bevan, 3 Rawle (Pa.) 23, 42; McFarland *v.* Newman, 9 Watts (Pa.) 55; Jackson *v.* Wetherill, 7 Serg & R. (Pa.) 480; Wetherill *v.* Neilson, 20 Pa. St. 448; Holmes *v.* Tyson, 147 Pa. St. 305; McAllister *v.* Morgan, 29 Pa. Super. Ct. 476; Krauskoff *v.* Pennypack Yarn Co., 26 *ibid.* 506.

the older ones, require an "intention to warrant" on the part of the seller. By this requirement, however, is generally meant not what Chief Justice Gibson required, an intent to contract or to agree to be bound, but an intent to make a statement as matter of fact rather than as matter of opinion.

It was said by Buller, J., in a case which did not involve the question of warranty:[1] "It was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended."[2] This statement in regard to the necessity of intent to warrant seems to have no earlier foundation. The decisions of Holt, alluded to, say nothing about intent, and Blackstone mentions no such requirement in his treatment of the subject.[3]

In theory all that seems necessary is that the affirmation should have been such as to lead a reasonable man to believe that a statement of fact was made to induce the bargain. Even in the formation of ordinary contracts the only intent, or assent to contract, necessary is that words or conduct shall justify the other party in assuming a particular meaning. Accordingly, in England, little stress seems to have been laid on the requirement of intent,[4] and in a recent case the doctrine was thus stated: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not."[5]

If this is the true meaning of the requirement of intent, it would seem better to find less misleading language to express the idea. The distinction stated in the language just quoted is between an affirmation of fact and a statement of opinion. What is to be

[1] Pasley *v.* Freeman, 3 T. R. 51. This was an action of deceit for a false and fraudulent statement by the defendant that a person with whom the plaintiff was about to deal was of good credit. It was held that a good cause of action was stated, although the defendant did not benefit by his false representation.

[2] P. 57.

[3] 3 Comm. 164.

[4] See, however, Stucley *v.* Baily, 1 H. & C. 405.

[5] DeLassalle *v.* Guildford, [1901] 2 K. B. 215, 221. This statement was borrowed from Benjamin, Sales, 5 ed., 659. The passage has also the sanction of American authority. Carleton *v.* Jenks, 80 Fed. 937 (C. C. A.); Roberts *v.* Applegate, 153 Ill. 210.

regarded as an affirmation of fact and what a statement of opinion, will be hereafter considered.[1] But the apparent meaning of the word intent and the understanding of some courts at least seem to point to a requisite besides an affirmation of fact. The American cases are in great conflict. An examination of them discloses a growing tendency to regard a positive statement by the seller by way of description of the goods or in regard to them as binding; and the meaning of intent, if inserted in the definition of warranty at all, seems to be apparent intent to assert a fact rather than an intent to agree to be bound. This is far from settled, however, and it is not always easy to arrive at an exact understanding of the meaning of the words the courts use. The jurisdictions may be roughly separated into two classes — those which lay stress upon the seller's intent[2] and those which avoid the use of the word intent in this connection altogether. The best modern authorities are reaching the latter result.[3]

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[1] *Infra*, p. 567.

[2] See note A, p. 576.

[3] This is shown by quotations in note A, p. 576, taken from late decisions of the courts of Alabama, Illinois, New York, Vermont, Virginia, and Wisconsin. It is also stated in recent cases in other jurisdictions. In McClintock *v.* Emick, 87 Ky. 160, in reply to a question the seller of mules said that they were "all right." The plaintiff's petition averred that the defendant merely "represented" the mules were all right. It was held that the petition sufficiently stated a cause of action and the evidence justified recovery; the court said: "Some of the cases, however, seem to make the existence of a warranty depend upon the intention of the vendor; and it is urged in this case that the petition is defective in failing to aver that the appellant expected or intended the appellee to rely upon his representation in making the purchase. If the true construction of this class of cases is that the decision did not turn upon whether the party intended to be held by a warranty, but whether he intended to affirm a fact or merely express an opinion, then they are reconcilable with the cases which, in our opinion, correctly hold that if one even supposes that he is not making himself liable upon a warranty, yet if he makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty, and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article or merely expressed an opinion as to it."

In Ormsby *v.* Budd, 72 Ia. 80, the court held representations amounted to a warranty, and said nothing in regard to the seller's intent. In Stroud *v.* Pierce, 6 Allen (Mass.) 413, 416, the court said: "The defendant contends that it should have been left to the jury to find whether this language was used with the intent of affirming the fact or of expressing an opinion, but the intent of the party is immaterial." So in Ingraham *v.* Union R. R. Co., 19 R. I. 356, a public announcement at an auction sale "that all horses about to be offered had been driven single, and that all horses which were not kind and safe to drive single would be specified at the time they were sold, was held to amount to a warranty that all horses then sold were kind and safe to drive singly

A troublesome distinction is sometimes made between what is called mere description and statements constituting a warranty. By mere description, it may be supposed, is meant words used simply for the purpose of identifying the goods. It is to be observed, however, that if descriptive words are used even for the purpose of identification, the description not only serves that purpose, but also inevitably represents that the goods correspond to the description, and is calculated to induce the buyer to purchase the goods on the assumption that the description is true. Accordingly if, as has been urged, it is unnecessary that the seller should in terms promise that his statements are true, or indicate an intention to be bound if they are not true, the seller should be liable. It was held in an early English case,[1] where the seller gave the following receipt, "received of [the buyer] 10 pounds for a gray, 4 yr. old colt, warranted sound in every respect," that there was no warranty of the colt's age, that being mere description. It is obvious that the seller's promise to warrant in this case related only to soundness, but that should give him no right to make positive untruthful assertions in regard to matters not included in the promise; the decision seems, therefore, erroneous.[2] If the statement, "warranted sound in every respect," had been omitted, the decisions presently to be referred to sufficiently show that the statement of age or any other descriptive statement would be a warranty. The addition of the warranty of soundness was undoubtedly for the purpose of giving the buyer an additional right, not for the purpose

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unless the contrary were stated, and the court said: "Nor is it true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. For if the representation as to the character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not." See also Shippen *v.* Bowen, 122 U. S. 575; Accumulator Co. *v.* Dubuque St. Ry. Co., 64 Fed. 70, 77 (C. C. A.); Miller *v.* Moore, 83 Ga. 684; Harrigan *v.* Advance Thresher Co., 26 Ky. L. Rep. 317, 81 S. W. 261; Creenshaw *v.* Slye, 52 Md. 140; Potomac Steamboat Co. *v.* Harlan, etc., Co., 66 Md. 42; J. I. Case Machine Co. *v.* McKinnon, 82 Minn. 75; Wolcott *v.* Mount, 7 Vroom (N. J.) 262; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260; Northwestern Lumber Co. *v.* Callendar, 36 Wash. 492, 498; Huntington *v.* Lombard, 22 Wash. 202; Campbell *v.* Smith, 13 Vict. L. Rep. 439.

[1] Budd *v.* Fairmaner, 8 Bing. 48.

[2] To the same effect is Richardson *v.* Brown, 1 Bing. 344. These decisions were followed in Willard *v.* Stevens, 24 N. H. 271, where the memorandum was as follows: "bought one red horse, 6 years old for $125. which I warrant sound and kind," and Anthony *v.* Halstead, 37 L. T. (N. S.) 433. See *infra*, p. 566.

of restricting the seller's liability, and should not affect the question.[1] Occasionally decisions still refer to "matter of description," or "descriptive statements," as if those terms were inconsistent with a warranty.[2]

No doubt there is a distinction between matter of description and collateral warranties in regard to the question whether the promise of a seller is an integral part of a single contract or is a collateral bargain, if that question is important, as it is held to be in some states in determining whether a promise in a contract to sell is a warranty which survives acceptance of the goods. But the cases here criticized seem to hold that matter of description imposes no obligation whatever on the seller. The law, however, is now convincingly settled that descriptive statements do constitute a warranty, whether the seller makes them or whether the buyer in ordering goods makes them and the seller furnishes goods in response to such an order.[3] Doubtless a description of goods by the

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[1] See *infra*, pp. 565, 566.

[2] In Shambaugh *v.* Current, 111 Ia. 121, a description of cattle in a written contract as "thoroughbred" was held not to constitute a warranty on the ground that the word was merely descriptive. The case was followed in Burnett *v.* Hensley, 118 Ia. 575. See also Carondelet Iron Works *v.* Moore, 78 Ill. 65; Baird *v.* Matthews, 6 Dana (Ky.) 133; Brown *v.* Baird, 5 Okl. 133.

[3] Josling *v.* Kingsford, 13 C. B. (N. S.) 447 ("oxalic acid"); Allan *v.* Lake, 18 Q. B. 560 (turnip seeds were sold as "Skiving's Swedes"); Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. 159 ("same quality as last lot" of steel); Flint *v.* Lyon, 4 Cal. 17 ("Haxall" flour); Miller *v.* Moore, 83 Ga. 684 ("No. 2 white mixed corn"); Americus Grocery Co. *v.* Brackett, 119 Ga. 489 ("Texas red rust-proof seed oats"); Henderson Elevator Co *v.* North Georgia Milling Co., 126 Ga. 279; Foos *v.* Sabin, 84 Ill. 564 ("fat cattle"); Telluride Power Co. *v.* Crane Co., 103 Ill. App. 647; Aultman-Taylor Co. *v.* Ridenour, 96 Ia. 638 (order for "twelve dingee horse power"); Morse *v.* Moore, 83 Me. 473 ("good clear merchantable ice, not less than twelve inches in thickness"); Osgood *v.* Lewis, 2 Har. & G. (Md.) 495 ("winter pressed sperm oil"); Edgar *v.* Breck, 172 Mass. 581 (bulbs of a named variety); Gould *v.* Stein, 149 Mass. 570 ("second-class ceara rubber"); Henshaw *v.* Robbins, 9 Met. (Mass.) 83 ("blue vitriol"); Wolcott *v.* Mount, 7 Vroom (N. J.) 262 ("strap-leaf, red-top turnip seed"); Hawkins *v.* Pemberton, 51 N. Y. 198 ("paris green"); White *v.* Miller, 71 N. Y. 118 ("large Bristol cabbage seed"); Abel *v.* Murphy, 43 N. Y. Misc. 648 ("grape fruit"); Lewis *v.* Rountree, 78 N. C. 323 ("strained rosin"); Northwestern Cordage Co. *v.* Rice, 5 N. Dak. 432 ("pure Manilla twine"); Morse *v.* Union Stock Yards, 21 Ore. 289 ("beef cattle"); Hoffman *v.* Dixon, 105 Wis. 315 ("rape seed"). See also Timken Carriage Co. *v.* Smith, 123 Ia. 554; Hastings *v.* Lovering, 2 Pick. (Mass.) 214; Hogins *v.* Plympton, 11 *ibid.* 97; Van Wyck *v.* Allen, 69 N. Y. 61; Jones *v.* George, 61 Tex. 345; Drew *v.* Edmunds, 60 Vt. 401. In Pennsylvania, however, in conformity with the narrow limits imposed by the law of that state on warranty, it is held that it is only in executory contracts to sell that the description of the goods imports a promise on the part of the seller. Selser *v.* Roberts, 105 Pa. St. 242;

seller does not necessarily imply that the description is literally true, and if a reasonable person would not draw such an inference from the description, there can be no warranty of the literal truth of the description. In a Massachusetts case[1] the sellers manufactured chains known in the market as horn chains. The buyer bought of the seller "all the horn chains they manufactured." The chains regularly manufactured by the seller, though they were what were known as horn chains in the market, were made partly of horn and partly of hoof. It was held that there was no warranty that the chains were wholly made of horn. The court put as an illustration the case of a sale of "gold watches." There is, of course, no warranty that watches sold under that designation are made of gold in every part. So a sale of a "No. 4 fire-proof safe" does not carry with it a warranty that the safe is in fact absolutely fire-proof.[2] These cases are not, however, opposed to the rule. In each of the cases just put there was a warranty. The question simply related to the construction of its terms. What is the proper meaning of "horn chain," "gold watch," "fire-proof safe"? The seller warrants anything he sells by such a description to be the sort of thing that a reasonable person, having knowledge of any customs of trade bearing upon the matter and binding upon him, would be justified in calling by that name.

How far statements made previously to the bargain may constitute a warranty is another question upon which light is shed by considering that the obligation of warranty may sound in tort rather than contract. If it is essential to the seller's liability that he should contract for the truth of his statements, statements made long prior to the bargain will not often be ground for liability. But as such statements affect the seller's mind and the effect of them remains, they are frequently the inducement to an ultimate sale. If the statement, therefore, was a natural inducement to the bargain, and the seller ought to have so understood, he should be liable, though the statements were long prior to the bargain and not naturally to be regarded as forming part of the contract itself.[3]

Ryan *v.* Ulmer, 108 Pa. St. 332, 137 Pa. St. 310; Fogel *v.* Brubaker, 122 Pa. St. 7. See further, *supra*, p. 559, n. 2.

[1] Swett *v.* Shumway, 102 Mass. 365.

[2] Diebold Safe Co. *v.* Huston, 55 Kan. 104.

[3] In some English cases still often cited, decided in the first half of the nineteenth century, it was held that an affirmation not made at the time of the sale could not constitute a warranty. Camac *v.* Warriner, 1 C. B. 356; Hopkins *v.* Tanqueray, 15 C. B. 130; Stucley *v.* Baily, 1 H. & C. 405. But later English cases have held

Another matter upon which it is of vital importance to understand that warranty may be tortious in character rather than contractual relates to the parol evidence rule. It is generally laid down that if the terms of a sale are reduced to writing, extrinsic evidence of a warranty not mentioned in the writing is not admissible.[1] Especially in modern times some qualification of this doctrine is to be observed in the cases. If the writing on its face does not appear to be a complete statement of the contract of purchase, the reason for the parol evidence rule is lacking and extrinsic evidence of a warranty should be admitted.[2]

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the seller liable under such conditions. Percival *v.* Oldacre, 18 C. B. (N. S.) 398; Cowdy *v.* Thomas, 36 L. T. (N. S.) 22; DeLassalle *v.* Guildford, [1901] 2 K. B. 215, and so it has generally been held in this country. Leavitt *v.* Fiberloid Co., 82 N. E. 682 (Mass.); Powers *v.* Briggs, 139 Mich. 664; Way *v.* Martin, 140 Pa. St. 499; Selig *v.* Rehfuss, 195 Pa. St. 200, 206; San Antonio Machine Co. *v.* Josey, 91 S. W. 598 (Tex., Civ. App.). See also Wilmot *v.* Hurd, 11 Wend. (N. Y.) 584; Dayton *v.* Hooglund, 39 Oh. St. 671; Hobart *v.* Young, 63 Vt. 363; Crossman *v.* Johnson, 63 Vt. 333; Somers *v.* O'Donohue, 9 U. C. C. P. 208. On the other hand decisions may be found, especially in jurisdictions which require an intent to warrant, to the effect that representations prior to a sale, though inducing it, did not amount to a warranty. James *v.* Bocage, 45 Ark. 284; Bryant *v.* Crosby, 40 Me. 9, 12; Ransberger *v.* Ing, 55 Mo. App. 621; Doyle *v.* Parish, 110 Mo. App. 470; Byrd *v.* Campbell Printing Press Co., 90 Ga. 542.

[1] Seitz *v.* Brewers' Refrigerator Co., 141 U. S. 510; Chandler *v.* Thompson, 30 Fed. 38 (C. C.); Empire State Phosphate Co. *v.* Heller, 61 Fed. 280 (C. C. A.); Wilson *v.* New U. S. Cattle Ranch Co., 73 Fed. 994 (C. C. A.); Buckstaff *v.* Russell, 79 Fed. 611 (C. C. A.); Davis Calyx Drill Co. *v.* Mallory, 137 Fed. 332 (C. C. A.); Whitehead *v.* Lane & Bodley Co., 72 Ala. 39; Fitch *v.* Woodruff & Beach Iron Works, 29 Conn. 82; Allen *v.* Young, 62 Ga. 617; Martin *v.* Moore, 63 Ga. 531; Holcombe *v.* Cable Co., 119 Ga. 466; Robinson *v.* McNeill, 51 Ill. 225; Telluride Power Co. *v.* Crane, 208 Ill. 218; Graham *v.* Eiszner, 28 Ill. App. 269; Nichols *v.* Wyman, 71 Ia. 160; Barrett *v.* Wheeler, 71 Ia. 662; Rodgers *v.* Perrault, 41 Kan. 385; Diebold Safe Co. *v.* Huston, 55 Kan. 104; Thomson *v.* Gortner, 73 Md. 474; Rice *v.* Codman, 1 Allen (Mass.) 377; Frost *v.* Blanchard, 97 Mass. 155; Schramm *v.* Boston Sugar Refining Co., 146 Mass. 211; Durkin *v.* Cobleigh, 156 Mass. 108; Otto *v.* Braman, 142 Mich. 185; Detroit Shipbuilding Co. *v.* Comstock, 144 Mich. 516; Nichols, Shepard & Co. *v.* Crandall, 77 Mich. 401; McCray Refrigerator, etc., Co. *v.* Woods, 99 Mich. 269; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281; Day Leather Co. *v.* Michigan Leather Co., 141 Mich. 533; McCormick Harvesting Machine Co. *v.* Thompson, 46 Minn. 15; Eighmie *v.* Taylor, 98 N. Y. 288; Plano Mfg. Co. *v.* Root, 3 N. Dak. 165; Houghton Implement Co. *v.* Doughty, 14 N. Dak. 331; Bond *v.* Clark, 35 Vt. 577; Buchanan *v.* Laber, 39 Wash. 410; Johnson's Adm. *v.* Mendenhall, 9 W. Va. 112; Cooper *v.* Cleghorn, 50 Wis. 113; Case Plow Works *v.* Niles & Scott Co., 90 Wis. 590.

[2] This principle was well expressed by Fuller, C. J., in Seitz *v.* Brewers' Refrigerator Co., 141 U. S. 510: "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agree-

It must be admitted that the principle thus stated is one very difficult of application, and the decisions cited in the two preceding notes are not all easy to reconcile on their precise facts. Another principle which has not yet been very clearly brought out by the cases should be clear wherever it is recognized that an affirmation or representation may form the basis of liability in warranty, even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties were contracting in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously inapplicable to a situation where an obligation is imposed by law, irrespective of any intention to contract. Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may of course be proved, and if a false but honest statement inducing the buyer to enter into the bargain renders a seller liable, though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was reduced to writing.[1]

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ment must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking were reduced to writing. Greenl., Ev., § 275." Other cases illustrating the doctrine are: Allen *v.* Pink, 4 M. & W. 140; Florence Wagon Works *v.* Trinidad Mfg. Co., 145 Ala. 677; Ruff *v.* Jarrett, 94 Ill. 475; Jackson *v.* Mott, 76 Ia. 263; Neal *v.* Flint, 88 Me. 72; Atwater *v.* Clancy, 107 Mass. 369; Leavitt *v.* Fiberloid Co., 82 N. E. 682 (Mass.); Phelps *v.* Whitaker, 37 Mich. 72; Palmer *v.* Roath, 86 Mich. 602; Hersom *v.* Henderson, 21 N. H. 224; Perrine *v.* Cooley, 39 N. J. L. 449; Charter Gas Engine Co. *v.* Kellam, 79 N. Y. App. Div. 231; Brigg *v.* Hilton, 99 N. Y. 517; Mayer *v.* Dean, 115 N. Y. 556; Routledge *v.* Worthington Co., 119 N. Y. 592; McMullen *v.* Williams, 5 Ont. App. 518; Hadley *v.* Bordo, 62 Vt. 285; Red Wing Mfg. Co. *v.* Moe, 62 Wis. 240.

[1] This argument is fully supported by the case of DeLassalle *v.* Guildford, [1901] 2 K. B. 215. In that case, though the parties had entered into a former lease, a contract of considerable solemnity, the plaintiff was allowed to prove that he took the lease only on receiving an oral assurance that the drains were in order, and the defendant was held liable upon this as upon a warranty collateral to the lease. So in the case of Waterbury *v.* Russell, 8 Baxt. (Tenn.) 159, it was held that misrepresentations of

There are other troublesome questions in the law of warranty which are not affected by regarding warranty as the basis of a tort rather than of a contract. In order to make out either a tort or a contract it is necessary that the seller's statement shall amount to one of fact rather than opinion. Neither a representation nor a promise of what the seller thinks, at least if honestly made, can make the seller liable. It is not easy to draw the line accurately between affirmation of fact on the one hand, and statements of opinion on the other. Several distinctions may be noticed. In the first place it seems obvious that any statement may be put in the form of a statement of opinion. If the seller says a horse is sound, he affirms a fact, but when he states that he believes him to be sound, the only fact which he asserts is his belief, and if he does in fact believe the horse to be sound, he could not be held liable if the horse were not sound. Again there are some matters which are in their nature so dependent on individual opinion that, no matter how positive the seller's assertion, it is not held to create a warranty. Such assertions as that things are fine or valuable, or better than productions of rival makers, are of this sort. It should be noticed, however, that the continual tendency of the law is to restrict the seller in regard to untruthful puffing of his wares. A further test has been suggested; namely, that if the statement is in regard to something of which the buyer is ignorant and relies upon the seller for information, a statement of the seller would be a warranty; but if the matter was one in regard to which the buyer had as good opportunity for forming an accurate judgment, and was as competent to pass such a judgment as the seller, the statement will be matter of opinion. This test does not seem conclusive, however. Though a buyer has the opportunity and the skill to pass judgment upon goods, he may be induced not to do so by positive statements of the seller. If such statements are made for the purpose of inducing a sale and do induce it, there seems no reason why the seller should not be liable. In any event the question concerns rather the buyer's reliance on the assertion than the character of the assertion itself, and the question should be dealt with under reliance. A more detailed consideration of authorities may now be given.

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the character of goods made to influence the bargain were warranties, though not inserted in the written contract of sale. But see Telluride Power Co. *v.* Crane, 103 Ill. App. 647, which held that such representations could not be shown unless fraudulent. See also Leavitt *v.* Fiberloid Co., 82 N. E. 682 (Mass.).

Since the distinction between what are statements of fact and what are expressions of opinion involves a discrimination between expressions which gradually shade from one to the other, the best way of indicating where the line between the two is to be drawn is by stating a number of decisions on each side. It is to be noticed that the same sort of question which is involved in the law of warranty is also to be observed in actions of tort for deceit and proceedings to rescind a transaction on account of fraud. While it cannot be asserted that any statement which is too largely mere matter of opinion to amount to a warranty may not, at least if fraudulently made, be ground for an action for deceit or proceedings for rescission of a bargain, the converse statement may be made; that is, if a statement falsely and fraudulently made will not sustain an action of deceit or afford ground for rescinding a contract, it is still more clear that it cannot amount to a warranty.[1]

The question whether a statement by the seller of an animal that it was sound is or may be a matter of opinion is one that has been much litigated. In the older cases the tendency was to hold that such a statement might be matter of opinion, although not so necessarily.[2]

The modern and better view is that such a statement positively made in such a way as to form part of the inducement of a sale is necessarily a warranty.[3]

Another class of cases that deserves special notice is that relating to statements of value. Such statements are generally expressions of opinion. The question more often arises in attempts to hold the seller for fraudulent conduct. A statement of facts upon which value depends is, however, an affirmation of fact. Therefore a statement of the cost of property or of offers received for it should be beyond the line allowed for seller's puffing.[4]

Even though a statement is of such character that it would be

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[1] See note B, p. 579.

[2] See Tyre *v.* Causey, 4 Har. (Del.) 425; Hawkins *v.* Berry, 10 Ill. 36; House *v.* Fort, 4 Blackf. (Ind.) 293; Baird *v.* Matthews, 6 Dana (Ky.) 129; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Whitney *v.* Sutton, 10 Wend. (N. Y.) 411; Erwin *v.* Maxwell, 3 Murph. (N. C.) 241; Inge *v.* Bond, 3 Hawks (N. C.) 101. In Pennsylvania the court has gone still further and held such a statement no evidence of a warranty. See *supra*, p. 559, n. 2.

[3] Riddle *v.* Webb, 110 Ala. 599; Cummins *v.* Ennis, 4 Del. 424; Joy *v.* Bitzer, 77 Ia. 73; McClintock *v.* Emick, 87 Ky. 160; Hobart *v.* Young, 63 Vt. 363.

[4] See *infra*, note B, p. 579. See also Phillips *v.* Crosby, 70 N. J. L. 785, stated *infra*, p. 580; Titus *v.* Poole, 145 N. Y. 414; also stated *infra*, p. 580; Oneal *v.* Weisman, 88 S. W. 290 (Tex., Civ. App.).

regarded merely as an expression of opinion under ordinary circumstances, there may be cases where a seller is subject to an extraordinary duty. Thus, the seller may expressly warrant the correctness of his opinion.[1] So where statements are made by one occupying the position of a fiduciary or an expert, expressions which might not render a person of a different character liable, will be actionable. This is well settled in the law governing actions of tort or deceit,[2] and there seems no reason to doubt that in the law of warranty the same distinction should be taken. A third class of cases which may be suggested consists of cases where the seller's expression of opinion is made with knowledge of its falsity. But whether a knowingly false statement of the seller's opinion may ever afford ground for an action of deceit because of the seller's fraud, on the ground that a statement by the seller of what he believes is in itself a statement of his own mental attitude which he should have no right fraudulently to misrepresent, knowledge of the incorrectness of his opinion seems to be no ground of liability in the law of warranty.[3]

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[1] Aultman *v.* Weber, 28 Ill. App. 91, the seller of a machine "warranted" that it would do as good work as any other in the market. This was held actionable. Had the buyer merely made a statement to this effect in the course of the negotiations, it may perhaps be doubted whether the court would have reached the same result.

So in Briggs *v.* Rumely Co., 96 Ia. 202, the seller of a machine "warranted" it "to do as good work as any other separator of its size in the United States."

In Hazelton Boiler Co. *v.* Fargo Gas Co., 4 N. Dak. 365, the sellers said, "we guarantee" that the boiler which was the subject-matter of the sale "will make a saving of at least 20 per cent in fuel as compared with any other horizontal boiler." This was held an actionable warranty. See also McCormick Harvesting Machine Co. *v.* Brower, 88 Ia. 607; Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582.

[2] 2 Cooley, Torts, 3 ed., 925.

[3] Deming *v.* Darling, 148 Mass. 504. This was an action for fraudulent representations for inducing the plaintiff to purchase a bond by representing that it was an A ♯ 1 bond and that the mortgaged railroad was good security for it. Holmes, J., in delivering the opinion of the court said: "The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. Pike *v.* Fay, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (Teague *v.* Irwin, 127 Mass. 217) and as to which it always has been 'understood, the world over, that such statements are to be distrusted.' Brown *v.* Castles, 11 Cush. (Mass.) 348, 350; Gordon *v.* Parmelee, 2 Allen (Mass.) 212; Parker *v.* Moulton, 114 Mass. 99; Poland *v.* Brownell, 131 Mass. 138; 142; Burns *v.* Lane, 138 Mass. 350, 356. Parker *v.* Moulton also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case market prices at least were

Reliance of the buyer upon the seller's statement is also another requirement of the law of warranty. This reliance is obviously part of the gist of any right in tort, and from the standpoint of contract the acceptance by the buyer of the bargain offered to him is a kind of reliance. There is danger, however, of giving greater effect to the requirement of reliance than it is entitled to. It is, of course, true that the warranty need not be the sole inducement to the buyer to purchase the goods.[1] And as a general rule no positive evidence of reliance by the buyer is necessary other than that the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods.[2]

The difficulties which arise in regard to questions of reliance relate to several special classes of cases which may be classified under four headings, as follows: (1) obvious or known defects; (2) inspection; (3) statements made previously to the bargain; (4) statements made subsequent to the bargain. Consideration has already been given to the third class, but something may be said in regard to the others.

The rule in regard to obvious defects is not always clearly stated, and two conceptions exist which are not always kept separate. In the first place a warranty in general terms is held not to cover defects which the buyer must have observed.[3] This is a rule of

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easily accessible to the plaintiff." It may safely be assumed that the court would have been at least equally clear that the language complained of did not amount to a warranty.

In Osborne *v.* McCoy, 107 N. C. 726, 730, the court said of a statement of opinion: "If knowingly false, it might have been cause for an action of deceit, but it was no warranty."

In regard to the liability of the maker of such a statement for deceit rather than warranty, the reasoning upon which a promise made with intent not to keep it has been held fraudulent, may be considered.

[1] Mitchell *v.* Pinckney, 126 Ia. 696, 698, and see cases in this article, *passim*.

[2] Shordan *v.* Kyler, 87 Ind. 38; Mitchell *v.* Pinckney, 126 Ia. 696; J. I. Case Co. *v.* McKinnon, 82 Minn. 75.

[3] Thompson *v.* Harvey, 86 Ala. 519; Huston *v.* Plato, 3 Colo. 402; Marshall *v.* Drawhorn, 27 Ga. 275; Ragsdale *v.* Shipp, 108 Ga. 817; O. H. Jewell Filter Co. *v.* Kirk, 102 Ill. App. 246, aff'd 200 Ill. 382; Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102; Dean *v.* Morey, 33 Ia. 120; Storrs *v.* Emerson, 72 Ia. 390; Scott *v.* Geiser Mfg. Co., 70 Kan. 498; Richardson *v.* Johnson, 1 La. Ann. 389; Brown *v.* Bigelow, 10 Allen (Mass.) 242; McCormick *v.* Kelly, 28 Minn. 135; Hansen *v.* Gaar, 63 Minn. 94; Branson *v.* Turner, 77 Mo. 489; Doyle *v.* Parish, 110 Mo. App. 470; Hanson *v.* Edgerly, 29 N. H. 343; Leavitt *v.* Fletcher, 60 N. H. 182; Schuyler *v.* Russ, 2 Caines (N. Y.) 202; Jennings *v.* Chenango County Ins. Co., 2 Den. (N. Y.) 75; Day *v.* Pool, 52 N. Y. 416; Parks *v.* Morris Ax & Tool Co., 54 N. Y. 586; Bennett *v.* Buchan, 76 N. Y. 386;

construction, and is based on an endeavor by the court to give effect to the intention of the parties. If the seller of a horse which is obviously blind, and which both parties know to be blind, says he is sound, the meaning of sound as used in that connection must be sound except as to his eyes. The same rule is applicable to a defect which is not obvious, but of which the seller tells the buyer,[1] or which the buyer knows.[2] Doubtless the early authorities[3] go beyond this and justify the rule that even if the seller said "I warrant his eyes are all right," the buyer could not recover. It may be supposed in such a case either that the seller did actually observe the defect, or that he did not. In so far as the supposition is that the buyer actually observed the defect the question may seem academic, but it is not altogether so; for though the defect may be observed, the nature or extent, or consequences of it, may not be. There seems no reason if the seller contracts in regard to an obvious defect or if he makes representations upon which the buyer in fact relies, why the seller should escape liability. It can hardly lie in his mouth to say that though he was making false representations or promises to induce the buyer to make the bargain, and the buyer was thereby induced, he should not have been. Certainly there is a growing tendency in the law not to allow that sort of argument.[4] A well-recognized limitation on any doctrine freeing the seller from liability for statements or promises in regard to obvious defects is that if the seller successfully uses art to

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Van Schoick *v.* Niagara Ins. Co., 68 N. Y. 434; Studer *v.* Bleistein, 115 N. Y. 316; Mulvany *v.* Rosenberger, 18 Pa. St. 203; Fisher *v.* Pollard, 2 Head (Tenn.) 314; Long *v.* Hicks, 2 Humph. (Tenn.) 305; Williams *v.* Ingram, 21 Tex. 300; McAfee *v.* Meadows, 32 Tex. Civ. App. 105; Hill *v.* North, 34 Vt. 604.

[1] Knoepker *v.* Ahman, 72 S. W. 483 (Mo., Ct. App.).

[2] Harwood *v.* Breese, 73 Neb. 521.

[3] See *supra*, p. 557.

[4] In Norris *v.* Parker, 15 Tex. Civ. App. 117, the court said: "There seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it and the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty." "A special warranty on the sale of a horse may be made to cover blemishes or defects which are open and visible, if the intention to do so is clearly manifested," is the language of the Supreme Court of Minnesota in the case of Fitzgerald *v.* Evans, 49 Minn. 541. In Watson *v.* Roode, 30 Neb. 264, 271, it is said: "The seller may bind himself against patent defects, if the warranty is so worded." See also Henderson *v.* R. R. Co., 17 Tex. 560; Hobart *v.* Young, 63 Vt. 363; Powell *v.* Chittick, 56 N. W. 652 (Ia.); Williams *v.* Ingram, 21 Tex. 300.

See also Branson *v.* Turner, 77 Mo. 489, stated *infra*, p. 580. June *v.* Falkinburg, 89 Mo. App. 563.

conceal the defects, the seller is liable.[1] That the buyer may be protected from the consequences of known defects by a warranty is well settled.[2]

Inspection may conceivably have a threefold importance in this connection. In the first place, if the defect was one which could be discovered by inspection, and the buyer did inspect the goods, it may be urged that the parties did not intend that the language used should cover this defect. This reasoning is analogous to that adopted in regard to obvious defects. An obvious defect, however, means a defect that is apparent upon casual inspection, and does not need careful or expert examination for its discovery. If the defect required examination of the latter sort, it is still more clear than in the cases of obvious defects that a seller who clearly promises or affirms that the goods are free from the defect which in fact vitiates them, will be liable. A second aspect in which inspection, or rather the right to inspect, may have a bearing on the seller's liability, arises where the buyer has full power and opportunity to inspect, and inspection if made would have disclosed the defective character of the goods, but the buyer fails to make the inspection. Whatever may be the law in regard to implied warranty,[3] in the case of express warranty it is no defense that the buyer, had he inspected, might have found out the falsity of the seller's statements. The buyer is justified in taking the

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[1] Kenner *v.* Harding, 85 Ill. 264, 268; citing Chadsey *v.* Greene, 24 Conn. 562; Robertson *v.* Clarkson, 9 B. Mon. (Ky.) 506; Gant *v.* Shelton, 3 *ibid.* 420; Irving *v.* Thomas, 18 Me. 418. To the same effect are Armstrong *v.* Bufford, 51 Ala. 410; Roseman *v.* Canovan, 43 Cal. 110; Perdue *v.* Harwell, 80 Ga. 150; Brown *v.* Weldon, 99 Mo. 564; Biggs *v.* Perkins, 75 N. C. 397.

[2] Thompson *v.* Harvey, 86 Ala. 519; Fitzgerald *v.* Evans, 49 Minn. 541; Branson *v.* Turner, 77 Mo. 489; Samuels *v.* Guin's Estate, 49 Mo. App. 8; Watson *v.* Roode, 30 Neb. 264, 43 Neb. 348; Pinney *v.* Andrus, 41 Vt. 631. In all these cases a defect in an animal which was the subject of the sale was observed by the buyer, and to induce the sale the seller warranted or represented the disease to be less serious than it in fact proved. The seller was therefore held liable. *Cf.* Ragsdale *v.* Shipp, 108 Ga. 817. There the buyer, examining an animal offered for sale and finding its throat swollen, asked the seller what was the matter with it? The seller replied that it had shipping cold and would be all right in a few days. There was nothing to show that the buyer did not have as full knowledge of the nature of the disorder as the seller. The statement was held to be merely an expression of opinion. The court does not decide, however, that if the other requisites of a warranty had existed, the fact that the defect was patent would have prevented the seller from being liable.

[3] Courts sometimes fail to observe the distinction between express and implied warranty in this respect. See *e. g.*, Egbert *v.* Hanford Produce Co., 92 N. Y. App. Div. 252.

seller at his word, and in relying upon the seller's statements rather than upon his own examination.[1]

A third possible importance of inspection by the buyer is as excluding reliance by the buyer on any statement of the seller in regard to the goods. It was held in a recent decision in New York that such was the effect of inspection.[2] Such a decision, however, misinterprets the requirement of reliance. There is no reason in the nature of things why a buyer should not rely both on the seller's statements and on his own judgment. Observation shows that buyers constantly do this, and accordingly it is generally and rightly held that inspection by the buyer does not excuse the seller from liability for words which amount to an express warranty.[3]

If the seller's liability on a warranty is based on an agreement to contract, consideration is essential, and the requirement in an action on the case for deceit of reliance by the plaintiff on the defendant's statement also involves the idea of detriment suffered by the plaintiff's reliance upon the statement.[4] If the statement

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[1] Thompson *v.* Bertrand, 23 Ark. 730. The seller of a slave gave a warranty of soundness. The buyer might have discovered the unsoundness of the slave's feet and knee by examination. The seller was held liable upon the warranty. Leitch *v.* Gillette-Herzog Mfg. Co., 64 Minn. 434. The seller of 500 iron bedsteads said that if the parts of one of the beds went together properly, the parts of all would do so. The buyer having found that one could be put together properly, made no further inspection. It was held that the plaintiff was entitled to recover, though had he set up more of the bedsteads he would have discovered that the parts would not go together properly. See also Jones *v.* Just, L. R. 3 Q B. 197, 204; First Bank *v.* Grindstaff, 45 Ind. 158; Meickley *v.* Parsons, 66 Ia. 63; Cook *v.* Gray, 2 Bush (Ky.) 121; Gould *v.* Stein, 149 Mass. 570, 577; Woods *v.* Thompson, 114 Mo. App. 38; Drew *v.* Edmunds, 60 Vt. 401; Barnum Wire Works *v.* Seley, 34 Tex. Civ. App. 47; Tacoma Coal Co. *v.* Bradley, 2 Wash. 600.

[2] Crocker-Wheeler Electric Co. *v.* Johns-Pratt Co., 29 N. Y. App. Div. 300, aff'd 164 N. Y. 593. The seller of material called "vulcabeston" represented that it was made of the best para rubber and selected asbestos, and that it was practically a perfect insulating material. Specimens were furnished the buyer, who experimented with them. The court said, as to the seller's statements: "They were not relied upon by the plaintiff or its predecessor; for, before making any contract, the officers of the plaintiff or its predecessor satisfied themselves, by their own investigation or experiment, that the representations made respecting the material and its sufficiency for their purposes were true. It is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on. Such was not the case here."

[3] Miller *v.* Moore, 83 Ga. 684; South Bend Co. *v.* Caldwell, 55 S. W. 208 (Ky.); Gould *v.* Stein, 149 Mass. 570; Smith *v.* Hale, 158 Mass. 178; Keely *v.* Turbeville, 11 Lea (Tenn.) 339; Woods *v.* Thompson, 114 Mo. App. 38.

[4] See *supra*, p. 557.

was unknown to the buyer at the time the sale was completed, it is obvious that there can be neither consideration from the standpoint of the law of contracts nor detrimental reliance from the standpoint of the law of deceit.[1]

Still more clearly, if no warranty was made at the time of the sale, a subsequent agreement to warrant will be invalid unless new consideration is given for it.[2] What constitutes new consideration depends on the general principle of the law of contracts. If the buyer was entitled to return the goods for any reason, or in good faith claimed such a right, a warranty given to induce him to forbear to exercise it and to keep the goods is supported by sufficient consideration.[3] But if the buyer had no color of right to return the goods, a warranty made subsequently to the sale as an inducement to the buyer to keep the goods,[4] is not binding. Where the title to property has passed but the price has not been fixed, a warranty made as part of the agreement fixing the price is binding.[5]

It has been held that a purchaser at an auction sale, who exacts a warranty after the goods have been knocked down to him but before he has paid for them may enforce the warranty.[6] A similar

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[1] Landman *v.* Bloomer, 117 Ala. 312. It was held that where the only evidence of express warranty was a printed circular issued by the seller, a charge was properly given that if the evidence failed to show that the circular came to the buyer's knowledge there was no express warranty. Lindsey *v.* Lindsey, 34 Miss. 432.

[2] Baldwin *v.* Daniel, 69 Ga. 782; Summers *v.* Vaughan, 35 Ind. 323; Farmers Ass'n *v.* Scott, 53 Kan. 534; White *v.* Oakes, 88 Me. 367; Cady *v.* Walker, 62 Mich. 157; Fletcher *v.* Nelson, 6 N. Dak. 94; Morehouse *v.* Comstock, 42 Wis. 626. It need hardly be said that if a warranty forms part of the terms of the sale, no separate consideration need be shown for the warranty. Standard Cable Co. *v.* Denver Electric Co, 76 Fed. 422 (C. C. A.), and cases in this article *passim*.

[3] Blaess *v.* Nichols & Shepard Co., 115 Ia. 373. Similarly, where goods are not promptly delivered by the seller and the buyer has the right to refuse to accept them, a warranty given to induce the buyer to overlook a breach of agreement is binding. Ohio Thresher Co. *v.* Hensel, 9 Ind. App. 328; Congar *v.* Chamberlain, 14 Wis. 258. Or where a written warranty made at the time of the sale did not accurately express the intention of the parties, one executed subsequently to correct the mistake is effectual. Barton *v.* Chicago Covering Co., 113 Mo. App. 462.

[4] White *v.* Oakes, 88 Me. 367; Fletcher *v.* Nelson, 6 N. Dak. 94.

[5] Vincent *v.* Leland, 100 Mass. 432.

[6] McGaughey *v.* Richardson, 148 Mass. 608. The court approved instructions laying down, in substance, "that if, before the money was paid and the horse was delivered, the question arose between the parties as to the form of the warranty to be given, and the parties agreed that these words of warranty should be written into the bill of sale as a part of the contract, and they were so written in, and the money was then paid and the horse delivered, the warranty would rest upon a good consideration, and would bind the defendant; but that if, after the horse had been delivered and the

decision has been made in regard to a sale not at auction.[1] So it has been held that a warranty made at any time before a delivery of the property will be valid.[2] These decisions cannot be accepted, however, without some qualification. Unless the buyer had some right or color of right for refusing to pay the price, a warranty given to induce him to do so would not be supported by sufficient consideration; for the payment of the price would be merely a performance by the buyer of what he was already under a legal obligation to do. Similarly, unless the buyer has a right, or color of right, to refuse proffered delivery of the goods, the acceptance of them will not be consideration sufficient to support a warranty.[3]

The parties may by agreement limit the effect of language which would otherwise be construed as an express warranty. The commonest illustration of this is where the seller makes statements in regard to the goods, but refuses to warrant the truth of the statements. Though the statements by themselves might be sufficient to constitute a warranty, the refusal not only indicates an unwillingness to contract for the truth of the statements, but also should put the buyer so on his guard that he would not be justified in buying in reliance upon them.[4] The seller's refusal to warrant may, however, be so qualified as not to be inconsistent with justifiable reliance by the buyer. A refusal to warrant that a horse is sound, should not preclude the buyer from relying on a statement that the horse is five years old, or a statement that the horse is sound to the best of the seller's knowl-

money paid, the warranty was inserted by the defendant in the bill of sale, and the defendant was not bound by the contract of sale to insert it, but he voluntarily chose to put it in, then the defendant was not bound by it."

[1] Douglas *v.* Moses, 89 Ia. 40. *Cf.* Erwin *v.* Maxwell, 3 Murph. (N. C.) 241.

[2] Webster *v.* Hodgkins, 25 N. H. 128.

[3] These decisions go back to the case of Butterfeild *v.* Burroughs, 1 Salk. 211, where the plaintiff declared that the defendant "sold him a horse" and warranted it, "whereupon" the plaintiff paid his money. It was objected in arrest of judgment that as the warranty was set forth it might have been made at a time after the sale, but the court held otherwise, "for the payment was afterwards, and it was that completed the bargain, which was imperfect without it." This decision was made at a time, however, when title to property did not pass until the price was paid, unless credit was expressly given. Therefore, until the payment was made in Butterfeild *v.* Burroughs, the title had not passed and the language of the court indicates this was the ground of decision. At the present day the presumption is that title passes as soon as parties are agreed upon the terms of the bargain and the goods are in deliverable condition. Consequently the mere fact that the price was not paid would not now show a bargain to be incomplete.

[4] Fauntleroy *v.* Wilcox, 80 Ill. 477; Lynch *v.* Curfman, 65 Minn. 170; Smith *v.* Bank, Riley Eq. (S. C.) 113.

edge.[1] There are indeed some cases where an express written warranty was made as to one fact and the court refused to construe assertions as to other facts as a warranty.[2] It is probable that the ground of these decisions is that the seller's descriptive statements would not constitute a warranty even had there been no other warranty contained in the writings. On whatever ground they are rested, the decisions, which are most of them old ones, seem open to criticism, as are many of the older cases on warranty. That descriptive statements may constitute a warranty has already been seen.[3] If this is granted, the express contract of warranty which the parties enter into does not seem to preclude a reasonable man from relying upon assertions as to other matters than those covered by the express contract. If then the buyer in fact relies upon such statements, an obligation should be imposed by law upon the seller as in other cases where he makes positive statements of fact upon which the buyer is justified in relying, although the words do not indicate an agreement to contract.

Samuel Williston.

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[1] Wood *v.* Smith, 5 M. & R. 124.

[2] In Richardson *v.* Brown, 1 Bing. 344, a memorandum of the sale of a horse stated the subject of the sale as "a horse 5 years old, has been constantly driven in the plough, warranted." It was held that this was a warranty of soundness and did not cover the assertion in regard to the horse's age.

So in Budd *v.* Fairmaner, 8 Bing. 48, the following memorandum, "received ten pounds for a gray four year old colt, warranted sound in every respect," was held to give no warranty as to the age of the animal.

So in Anthony *v.* Halstead, 37 L. T. (N. S.) 433, this receipt, "received sixty pounds for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," was held to give no warranty that the horse was quiet to ride or drive. See also to the same effect Dickenson *v.* Gapp, cited in 8 Bing. 50, and Willard *v.* Stevens, 24 N. H. 271.

[3] *Supra*, p. 563.

NOTE A.

In Berman *v.* Woods, 38 Ark. 351, an order was given for a printing press based on representations in the seller's letters and catalogue of the size and capacity of the press. The press was sent, but the buyer claimed it was not in accordance with the statements. The court held that as the press did not correspond in one material respect, the size of the form which it would print, with the representations made in correspondence, rescission for breach of warranty might have been made if the buyer had acted promptly. As to the representations, the nature of which is not stated, in regard to the merits of the press made by the sellers in their circular, the court held that they did not amount to warranties; saying: "They are the usual artifices of enterprise and competition," and quoted 1 Parsons, Contracts, 588, to the effect that a purchaser "cannot rely upon all statements and assertions made by the maker in circulars concerning the article as a warranty that it will do what is stated."

An intention to warrant is also said to be necessary in Hartin Commission Co. *v.* Pelt, 88 S. W. 929 (Ark.).

In Barnett *v.* Stanton, 2 Ala. 181, the seller of clothing represented it to be "fresh, well-made, and suitable for the market." The court held that there was no warranty; saying, "No matter how positive the representation of the seller may be, it will be regarded as an expression of his belief, or opinion, unless it was intended and received as a stipulation that the property was of the quality represented."

In McCaa *v.* Elam Drug Co., 114 Ala. 74, 86, the court said, however: "Every vendor, whether he be a dealer or not, is responsible for his representations or affirmations as to quality, which are more than expressions of opinion and which are relied upon, and upon which the party purchasing has the right to rely," and also: "The purchaser may have had no opportunity to examine the article, or, if subject to examination and in fact examined, he may not possess the requisite information to enable him to determine. In such a case, if the vendor affirms or represents the quality of the goods, as a fact, he is bound by such representation or affirmation."

It will be seen that in these statements nothing is said about the seller's intention.

In Polhemus *v.* Heiman, 45 Cal. 573, 578, the court defined a warranty as follows: "Any affirmation made at the time of sale as to the quality or condition of the thing sold will be treated as a warranty if it was so intended." In McLennan *v.* Ohmen, 75 Cal. 558, the court laid down the same rule, adding: "Whether it was so intended and the purchaser acted upon it are questions of fact for the jury."

In Illinois several early cases laid stress upon the intention of the seller. In Ender *v.* Scott, 11 Ill. 35, an instruction to the jury that "if the defendant represented in positive terms to the plaintiff before the exchange that the mare was sound, such positive assertion will amount to a warranty," was held to be erroneous because it was said that the plaintiff might not have intended the assertion as a proposition to warrant. Intention was also laid stress upon in Adams *v.* Johnson, 15 Ill. 345. In Hanson *v.* Busse, 45 Ill. 496, the court, though giving a definition of warranty which included the requirements of intention, held that in case of a sale by sample a representation that the bulk was as good as the sample, necessarily amounted to a warranty.

In Reed *v.* Hastings, 61 Ill. 266, 268, the court effectually limited its earlier decisions by holding that "the intention with which the representation is made is to be determined by the character of the representation made, and the object to be effected by it." The court further said, broadly: "When the representation is positive and relates to a matter of fact, it constitutes a warranty. . . . It surely cannot be the law that a vendor of a chattel is permitted to make any false statements of fact in relation to the article which he may choose to indulge in, thereby inducing the purchase, and not being accountable to the purchaser." The same test was applied in Kenner *v.* Harding, 85 Ill. 264, and in Roberts *v.* Applegate, 153 Ill. 210, 216.

In Phillips *v.* Vermillion, 91 Ill. App. 133, however, the court without citing any cases held that the question of intention was vital.

In Indiana the court lays stress on intent.

In House *v.* Fort, 4 Blackf. (Ind.) 293, the court held that a statement that a horse was sound, made to induce the sale, was not, *per se*, a warranty. "It is of itself only a representation. To give it the effect of a warranty there must be evidence to show that the parties intended it to have that effect."

So in Jones *v.* Quick, 28 Ind. 125, it was held that the words must have been "intended and understood" as a warranty. In Smith *v.* Borden, 160 Ind. 223, 228, the court does not put the matter so strongly: "Any positive representation, assertion, or affirmation, made by the seller during the pendency of the negotiations for the sale, not the mere expression of an opinion or belief, which fairly expresses the intention of the seller to warrant the article or property sold to be what it is

represented, will constitute an express warranty." See also Bowman *v.* Clemmer, 50 Ind. 10.

In Ransberger *v.* Ing, 55 Mo. App. 621, the court held that a mere assertion of the quality or condition of a chattel at the time of a sale is not, as matter of law, a warranty, but it is merely evidence thereof as it may tend to show the intention of the parties, which is a question for the jury.

In Kircher *v.* Conrad, 9 Mont. 191, the court held that a statement made by a seller that certain wheat was "spring wheat" was not a warranty. The court relied on Shisler *v.* Baxter, 109 Pa. St. 443, and Lord *v.* Grow, 39 Pa. St. 88, which do indeed support the decision of the Montana court, but, as has been seen, the law of Pennsylvania is peculiar.

Seixas *v.* Woods, 2 Caines (N. Y.) 48. In this case the seller advertised certain wood he had for sale as "brazilletto," and showed to the plaintiff an invoice of the wood received from the person who had sold it to him, describing the wood by that name. He also made out a bill of parcels to the plaintiffs for the wood under that name. In fact, the wood was peachum, but the defendant did not know it. This was held no warranty because it did not appear by the evidence that the seller so intended. Again, in Swett *v.* Colgate, 20 Johns. (N. Y) 196, the court held a description of certain goods by the seller as "barilla" did not amount to a warranty that they were such. The law of New York, however, is no longer indicated by these cases.

In Hawkins *v.* Pemberton, 51 N. Y. 198, Earl, J., says: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee."

In North Carolina early decisions laid stress on intent, and apparently by intent, meant an intent to contract. Erwin *v.* Maxwell, 3 Murph. (N. C.) 241; Foggart *v.* Blackweller, 4 Ired. (N. C.) 238. In McKinnon *v.* McIntosh, 98 N. C. 89, 92, however, the court says: "That for misrepresentation the vendor is liable as on a warranty 'if such representation was intended not as a mere expression of an opinion but the positive assertion of a fact upon which the purchaser acts,' and this is a question for the jury."

In Vermont the rule as to intention has been strictly applied until recently. In Enger *v.* Dawley, 62 Vt. 164, an instruction was requested that if a catalogue was used by the parties and referred to by them in completing the sale, and the defendant relied on statements therein and believed them to be true, they were, in legal effect, warranties. The court held the instruction correctly refused, saying: "To constitute a representation a warranty, it must have been so intended and understood by the parties, both vendor and vendee. Beeman *v.* Buck, 3 Vt. 53; Foster *v.* Caldwell's Estate, 18 Vt. 176; Bond *v.* Clark, 35 Vt. 577; Houghton *v.* Carpenter, 40 Vt. 588; Pennock *v.* Stygles, 54 Vt. 226; or, intended by the parties as a part of the contract. Richardson *v.* Grandy, 49 Vt. 22; or, have formed the basis of the contract; Beals *v.* Olmstead, 24 Vt. 114; Drew *v.* Edmunds, 60 Vt. 401." In Hobart *v.* Young, 63 Vt. 363, 369, however, the court modified its previous position, saying: "Any affirmation as to the kind or quality of the thing sold, not uttered as matter of commendation, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of

assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty. And in case of oral contracts, it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not."

In Mason *v.* Chappel, 15 Grat. (Va.) 572, 583, the court said: "No affirmation, however strong, will constitute a warranty unless it was so intended. If it is intended as a warranty, the vendor is liable, if it turns out to be false, however honest he may have been in making it; but if it is intended as an expression of opinion merely, or as simple praise or commendation of the article, he is not liable, unless it can be shown that he knew at the time that it was untrue." In later Virginia cases, however, less stress is laid upon intent. In Herron *v.* Dibrell, 87 Va. 289, the court held that statements made in regard to tobacco that it was "sound" and "redried" and in "good keeping order," amounted to a warranty. The court quoted with approval: "The general rule is that whatever a person represents at the time of the sale is a warranty." See also Milburn Wagon Co. *v.* Nisewarner, 90 Va. 714.

In Giffert *v.* West, 33 Wis. 617, the court held: "that an affirmation made by the vendor at the time of the sale amounts to an express warranty, if it appears on the facts stated or proven to have been so intended and received." In Hoffman *v.* Dixon, 105 Wis. 315, however, the court held: "An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant but on which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most equivocal language on the subject. . . . The better class of cases holds that a positive affirmation of a material fact as a fact, intended to be relied upon as such and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not. The latter is the doctrine of this court, as indicated by numerous cases where it has been applied." To similar effect is J. H. Clark Co. *v.* Rice, 127 Wis. 451. See also Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. 159; Unland *v.* Garton, 48 Neb. 202; Cole *v.* Carter, 22 Tex. Civ. App. 457.

NOTE B.

In the following cases relief was allowed: Sauerman *v.* Simmons, 74 Ark. 563, an action of rescission for breach of warranty. Held a question for the jury whether representations as to a pump "that it would lift 35 feet on a straight lift" amounted to a warranty. Mason *v.* Thornton, 74 Ark. 46, an agreement that the price of the goods sold should be determined by the cost marks upon them was held to involve a statement by the seller that the marks purporting to indicate the cost did so in fact, and that tort for deceit would lie if the seller knew the marks to be inaccurate.

Burge *v.* Stroberg, 42 Ga. 88, a statement that a horse was 14 years old, held a warranty.

In Trench *v.* Hardin County Canning Co., 67 Ill. App. 269, the seller wrote: "understand we quote you only on cases that are well made, tested, and in every way satisfactory for your work." This was held to create a warranty that cars bought thereafter were first class in every particular.

Forcheimer *v.* Stewart, 65 Ia. 593, a description of hams as "choice sugar-cured canvased hams" was held a statement of fact.

Latham *v.* Shipley, 86 Ia. 543, statements were made in a catalogue in regard to a machine that it was in "first class order," and in letters that "it will certainly do your work," the buyer had not seen the machine and relied on the seller's statements Held, the seller was liable in damages for breach of warranty.

Stevens *v.* Bradley, 89 Ia. 174, the owner of hogs at an auction sale announced that

they were as "thrifty a lot as he had ever owned, and that he had been in the hog business a good many years." Held a warranty of soundness.

Harrigan *v.* Advance Thresher Co., 26 Ky. L. Rep. 317, statements in regard to a second-hand engine that it was "all right, in good condition," and "could do the work of any good twelve horse power engine" if untrue, justified recoupment in an action for the price.

McClintock *v.* Emick, 87 Ky. 160, a statement pending a bargain that mules were "all right" amounts to a warranty of soundness.

Bryant *v.* Crosby, 40 Me. 9, the statement that "sheep are young and healthy" is a statement of fact.

Morse *v.* Moore, 83 Me. 473, "good clear merchantable ice not less than twelve inches in thickness." These words were part of the seller's promise in a written contract and were held to amount to a warranty.

J. I. Case Co *v.* McKinnon, 82 Minn. 75, an assurance that an engine had "ample power" to run a separator was held to render the seller liable as a warrantor.

Branson *v.* Turner, 77 Mo. 489. The seller wrote the buyer that he had a fine steer for sale, that the steer had a sore under his neck, "but that don't hurt him, it is most well." The buyer replied, "if your cattle are as good as represented you can deliver them." The steer was thereupon sent with others. It was held this amounted to a warranty.

Burr *v.* Redhead, 52 Neb. 617, statements that bicycles were to be of "good materials" and of the "highest possible grade" were held statements of fact.

Lederer *v.* Yule, 67 N. J. Eq. 65, a representation that a patented burglar alarm could be made as good as a sample for a specified price, was held ground for rescission for fraud. This necessarily involved a decision that the representation was as to matter of fact rather than opinion.

Phillips *v.* Crosby, 70 N. J. L. 785, representations by the seller of oil stock as to the lands owned by the company, the number of oil wells upon the lands and their productiveness. It was held that they should be submitted to the jury to find whether there was a warranty.

Money *v.* Fisher, 92 Hun (N. Y.) 347, on purchase of a bull the buyer asked if he was "fat and all right" and said he would purchase on that condition. The seller answered "yes." This was held a warranty.

Titus *v.* Poole, 145 N. Y. 414, on selling bank stock the seller stated that the bank was organized under the laws of Pennsylvania, that the stock was worth one hundred cents on the dollar, that it was good high dividend paying stock. It was held the seller was liable for these statements as upon a warranty that the stock was worth par and that the bank was organized as represented.

May *v.* Loomis, 140 N. C. 350, statements fraudulently made by the sellers of timber that they had had it carefully estimated and that the estimate showed a specified quantity, are statements of fact, and entitle the buyer to a counter-claim when sued for the price.

Reese *v.* Bates, 94 Va. 321, a statement that guano was "as good as any in the market" is a statement of fact.

Northwestern Lumber Co. *v.* Callendar, 36 Wash. 492, representations by the seller of machinery to make boxes, as to the worth of the machinery and the boxes made by it, were held warranties justifying a finding for the buyer in an action for the balance of the price.

Winkler *v.* Patten, 57 Wis. 405, statements that goods were "good bagging and gunnies" and were "far superior to any Chicago and Milwaukee packings" and were "worth 2½ cts. per pound" amounted to a warranty justifying the buyer in counter-claiming in an action for the price.

Milwaukee Machine Co. *v.* Hamacek, 115 Wis. 422, the seller's statement that an

engine was "as good as new in every particular" is an assertion of fact. See also Lamme *v.* Gregg, 1 Met. (Ky.) 444; Dickens *v.* Williams, 2 B. Mon. (Ky.) 374; Young *v.* Van Natta, 113 Mo. App. 550; Love *v.* Miller, 104 N. C. 582; Reiger *v.* Worth, 130 N. C. 268; Beasley *v.* Surles, 140 N. C. 605.

In the following cases relief was denied:

Chalmers *v.* Harding, 17 L. T. (N. S.) 571, a statement in regard to a reaping machine that it would "cut wheat, barley, &c., efficiently," held no warranty.

Brawley *v.* United States, 96 U. S. 168, a contract for the sale of an entire lot of goods, naming the quantity with the addition of the words "more or less." It was held that the representation as to quantity was merely an estimate of opinion.

Schroeder *v.* Trubee, 35 Fed. 652, a statement by the seller of stock, made in good faith, that dividends which had been declared had been earned and that the stock account was "all right," held no warranty.

Sleeper *v.* Wood, 60 Fed. 888 (C. C. A.), a statement that canned corn was of the "best packing of 1888" accompanied with "usual guaranty against swells," was matter of opinion.

Crosby *v.* Emerson, 142 Fed. 713 (C. C. A.), a statement by the seller of mining stock in regard to the value of the property, with prophecies as to the prospects of the company, held no defense to an action for the price. Farrow *v.* Andrews, 69 Ala. 96, a representation by a seller of guano that it was a good fertilizer, held no warranty.

Shiretzki *v.* Kessler, 37 So. 422 (Ala.), a statement that certain whiskey would meet the wants of the buyer's trade, held no defense to an action for the price.

Bain *v.* Withey, 107 Ala. 223, a statement that a patented article was "a valuable and useful improvement" held a mere expression of opinion and no defense to an action for the price.

Baldwin *v.* Daniel, 69 Ga. 782, a representation that a plow "would sell well in Mississippi," held a statement of opinion, and no defense to an action for the price.

Navassa Co. *v.* Commercial Co., 93 Ga. 92, a sale of a specific pile of guano "estimated" to contain 253⅓ tons was agreed upon. The purchaser was held bound to take the entire pile, though it contained 702⅞ tons.

Towell *v.* Gatewood, 3 Ill. 22, statement in a bill of sale describing tobacco as "good first and second rate tobacco" held a statement of opinion.

Barrie *v.* Jerome, 112 Ill. App. 329, statements by a seller of Balzac's works that they were "nice books," "books that children love to read," were statements of opinion merely, and no defense to an action for the price.

Jackson *v.* Mott, 76 Ia. 263, a statement of the age of a horse was held erroneously ruled as warranty as matter of law. The question should have been submitted to the jury.

Shambaugh *v.* Current, 111 Ia. 121, and Burnett *v.* Hensley, 118 Ia. 575, a description of animals as "thoroughbred" was held not a statement of fact.

Gaar *v.* Halverson, 128 Ia. 603, statements that an engine was "practically as good as new," and was of sufficient power to drive the defendant's machinery, held expressions of opinion, and no defense to an action for the price.

Bryant *v.* Crosby, 40 Me. 9, a statement that "sheep would shear from 3 to 5 lbs. of wool per head, and that the buyer could pay for the sheep by the wool from the sheep in two years, and have wool left," a statement of opinion.

Rice *v.* Codman, 1 Allen (Mass.) 377, bill of sale of gunny cloth which specified the weight as "per foreign invoice" was held not a warranty that the actual weight corresponds with the invoice weight, and the seller was not liable in damages.

Deming *v.* Darling, 148 Mass. 504, a statement that a bond was "an A #1 bond" was held a matter of opinion, not making the seller liable for fraudulent representations.

In Morley *v.* Consolidated Mfg. Co., 81 N. E. 993 (Mass.), the plaintiff bought a second-hand automobile for about one-half the price of a new car. He used it several

months when the crank shaft broke and damaged the engine materially. The agent who sold the machine to the plaintiff said at the time of the sale "that the machine had been used as a demonstrating car and had been run about five hundred miles; that it was in first class condition and all right." The trial court ordered a verdict for the defendant, which was upheld, the court saying, "There was no express warranty, all that Read said as to the value and nature of the machine was mere sellers' talk."

Worth *v.* McConnell, 42 Mich. 473, a statement that a threshing machine "is a very good machine and will do very nice work" held not a warranty and no defense to an action for the price.

Linn *v.* Gunn, 56 Mich. 447, the seller of a stock of goods represented that the stock equalled in cost an amount shown by an inventory less an amount shown in his books as received from sales. The seller was held not liable. His statements were made in good faith and the purchaser was experienced.

Matlock *v.* Meyers, 64 Mo. 531, statement in regard to a mare that she is a "good mare" held not a warranty of soundness, and not to make the seller liable for a defect in her eyes.

Bartlett *v.* Hoppock, 34 N. Y. 118, a statement by an Ohio drover to a New York City stock buyer in regard to hogs that they were "suitable and proper for the New York market" was held matter of opinion. The hogs were open to inspection, and the court said: "the purchaser had much the better opportunity of knowledge, and were it otherwise it would not constitute a warranty in law." There was therefore no defense to an action for the price.

Stumpp *v.* Lynber, 84 N. Y. Supp. 912, a statement that roses offered for sale "were very fine stock" held not a warranty, and no defense to an action for the price. Cash Register Co. *v.* Townsend Grocery Store, 137 N. C. 652. Statements that a cash register "would do away with a book-keeper," "that the books could be kept on the machine," "that the machine could be operated by a person of ordinary intelligence," held to be statements of opinion, and no defense to an action for the price.

Osborne *v.* McCoy, 107 N. C. 726, a statement by the seller "that a horse was sound as far as he knew," honestly made, held no warranty.

Worrell *v.* Kinnear Mfg. Co., 103 Va. 719, a statement that a bid was as low as work in question could be done for and there was no profit at that price, held expressions of opinion, which did not justify rescission by the purchaser.

Baker *v.* Henderson, 24 Wis. 509, a statement that "trees had not been injured by exposure to the weather," held no warranty and no defense to an action for the price.

Elkins *v.* Kenyon, 34 Wis. 93, a statement of an agricultural machine that it would work "in all kinds of hay, grain, straw and other grass," held no warranty. See also Tabor *v.* Peters, 74 Ala. 90; Englehardt *v.* Clanton, 83 Ala. 336; Collins *v.* Tigner, 60 Atl. 978 (Del.); Roberts *v.* Applegate, 153 Ill. 210; Lynch *v.* Murphy, 171 Mass. 307; Bates County Bank *v.* Anderson, 85 Mo. App. 351; Anthony *v.* Potts, 63 Mo. App. 517; Walsh *v.* Hall, 66 N. C. 233; Oneal *v.* Weisman, 88 S. W. 290 (Tex., Civ. App.); Tenney *v.* Cowles, 67 Wis. 594.